APPENDIX.

A. Selected provisions of the Shipping Act, 1916 (extracted from Title 46, U. S. C. A.).

* * * *

Sec. 15. (46 U. S. C. sec. 814.) Every common carrier by water, or other person subject to this chapter [Act], shall file immediately with the commission [board] a true copy, or, if oral, a true and complete memorandum, of every agreement, with another such carrier or other person subject to this chapter [Act], or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term "agreement" in this section includes understandings, conferences, and other arrangements.

The commission [board] may by order disapprove, cancel, or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors or to operate to the detriment of the commerce of the United States, or to be in violation of this chapter [Act], and

shall approve all other agreements, modifications, or cancellations.

Agreements existing at the time of the organization of the commission [board] shall be lawful until disapproved by the commission [board]. It shall be unlawful to carry out any agreement or any portion thereof disapproved by the commission [board].

All agreements, modifications, or cancellations made after the organization of the commission [board] shall be lawful only when and as long as approved by the commission [board], and before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation.

Every agreement, modification, or cancellation lawful under this section shall be excepted from the provision of sections 1-11 and 15 of Title 15, and amendments and Acts supplementary thereto.

Whoever violates any provision of this section shall be liable to a penalty of $1,000 for each day such violation continues, to be recovered by the United States in a civil action.

* * * *

Sec. 22. (46 U. S. C. sec. 821.) Any person may file with the commission [board] a sworn complaint setting forth any violation of this chapter [Act] by a common carrier by water, or other person subject to this chapter [Act], and asking reparation for the injury, if any, caused thereby. The commission [board] shall furnish a copy of the complaint to such carrier or other person, who shall, within a reasonable time specified by the commission [board] satisfy the complaint or answer it in writing. If the complaint is not satisfied the commission [board] shall, except as otherwise provided in this chapter [Act], investigate it in such manner and by such means, and make such order as it deems proper. The commission [board], if the

complaint is filed within two years after the cause of action accrued, may direct the payment, on or before a day named, of full reparation to the complainant for the injury caused by such violation.

The commission [board], upon its own motion, may in like manner and, except as to orders for the payment of money, with the same powers, investigate any violation of this chapter [Act].

Sec. 23. (46 U. S. C. sec. 822.) Orders of the commission relating to any violation of this chapter [Act] shall be made only after full hearing, and upon a sworn complaint or in proceedings instituted of its own motion.

All orders of the United States Maritime Commission, other than for the payment of money, made under this chapter [Act], as amended or supplemented, shall continue in force until its further order, or for a specified period of time, as shall be prescribed in the order, unless the same shall be suspended, or modified, or set aside by the commission, or be suspended or set aside by a court of competent jurisdiction.

* * * *

Sec. 25. (46 U. S. C. sec. 824.) The commission may reverse, suspend, or modify, upon such notice and in such manner as it deems proper, any order made by it. Upon application of any party to a decision or order it may grant a rehearing of the same or any matter determined therein, but no such application for or allowance of a rehearing shall, except by special order of the commission, operate as a stay of such order.

* * * *

Sec. 31. (46 U. S. C. sec. 830.) The venue and procedure in the courts of the United States in suits brought to enforce, suspend, or set aside, in whole or in part, any order of the commission [board] shall,

except as otherwise provided, be the same as in similar suits in regard to orders of the Interstate Commerce Commission, but such suits may also be maintained in any district court having jurisdiction of the parties.

• • • •

B. Selected provisions of the Hobbs Act, Public Law 901, 81st Congress, Second Session (1950) (extracted from Title 5, U. S. C. A.).

• • • •

Sec. 2. (5 U. S. C. sec. 1032.) The court of appeals shall have exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of, all final orders (a) of the Federal Communications Commission made reviewable in accordance with the provisions of section 402 (a) of Title 47, and (b) of the Secretary of Agriculture made under the Packers and Stockyards Act, 1921, as amended, and under the Perishable Agricultural Commodities Act, 1930, as amended, except orders issued under sections 210 (e), 217a, and 499g(a) of Title 7, and (c) such final orders of the United States Maritime Commission or the Federal Maritime Board or the Maritime Administration entered under authority of the Shipping Act, 1916, as amended, and the Intercoastal Shipping Act, 1933, as amended, as are now subject to judicial review pursuant to the provisions of section 830 of Title 46.

Such jurisdiction shall be invoked by the filing of a petition as provided in section 1034 of this title.

Sec. 3. (5 U. S. C. sec. 1033.) The venue of any proceeding under this chapter [Act] shall be in the judicial circuit wherein is the residence of the party or any of the parties filing the petition for review, or wherein such party or any of such parties has its

principal office, or in the United States Court of Appeals for the District of Columbia.

Sec. 4. (5 U. S. C. sec. 1034.) Any party aggrieved by a final order reviewable under this chapter [Act] may, within sixty days after entry of such order, file in the court of appeals, wherein the venue as prescribed by section 1033 of this title lies, a petition to review such order. Upon the entry of such an order, notice thereof shall be given promptly by the agency by service or publication in accordance with the rules of such agency. The action in court shall be brought against the United States. The petition shall contain a concise statement of (a) the nature of the proceedings as to which review is sought, (b) the facts upon which venue is based, (c) the grounds on which relief is sought, and (d) the relief prayed. The petitioner shall attach to the petition, as exhibits, copies of the order, report, or decision of the agency. The clerk shall serve a true copy of the petition upon the agency and upon the Attorney General of the United States by mailing by registered mail, with request for return receipt, a true copy to the agency and a true copy to the Attorney General.

* * * *

Sec. 8. (5 U. S. C. sec. 1038.) The Attorney General shall be responsible for and have charge and control of the interests of the Government in all court proceedings authorized by this chapter. The agency, and any party or parties in interest in the proceeding before the agency whose interests will be affected if an order of the agency is or is not enjoined, set aside, or suspended, may appear as parties thereto of their own motion and as of right, and be represented by counsel in any proceeding to review such order. Communities, associations, corporations, firms, and indi-

viduals, whose interests are affected by the agency's order, may intervene in any proceeding to review such order. The Attorney General shall not dispose of or discontinue said proceeding to review over the objection of such party or intervenors aforesaid, but said intervenor or intervenors may prosecute, defend, or continue said proceeding unaffected by the action or nonaction of the Attorney General therein.

Sec. 9. (5 U. S. C. sec. 1039.) (a) Upon the filing and service of a petition to review, the court of appeals shall have jurisdiction of the proceeding. The court of appeals in which the record on review is filed, on such filing, shall have jurisdiction to vacate stay orders or interlocutory injunctions theretofore granted by any court, and shall have exclusive jurisdiction to make and enter, upon the petition, evidence, and proceedings set forth in the record on review, a judgment determining the validity of, and enjoining, setting aside, or suspending, in whole or in part, the order of the agency.

(b) The filing of the petition to review shall not of itself stay or suspend the operation of the order of the agency, but the court of appeals in its discretion may restrain or suspend, in whole or in part, the operation of the order pending the final hearing and determination of the petition. Where the petitioner makes application for an interlocutory injunction suspending or restraining the enforcement, operation, or execution of, or setting aside, in whole or in part, any order reviewable under this chapter [Act], at least five days' notice of the hearing thereon shall be given to the agency and to the Attorney General of the United States. In cases where irreparable damage would otherwise ensue to the petitioner, the court of appeals may, on hearing, after not less than five days' notice to the agency and to

the Attorney General, order a temporary stay or suspension, in whole or in part, of the operation of the order of the agency for not more than sixty days from the date of such order pending the hearing on the application for such interlocutory injunction, in which case such order of the court of appeals shall contain a specific finding, based on evidence submitted to the court of appeals, and identified by reference thereto, that such irreparable damage would result to petitioner and specifying the nature of such damage. The court of appeals, at the time of hearing the application for an interlocutory injunction, upon a like finding, may continue the temporary stay or suspension, in whole or in part, until decision on the application.

The hearing upon such an application for an interlocutory injunction shall be given preference and expedited and shall be heard at the earliest practicable date after the expiration of the notice of hearing on the application provided for above.

Upon the final hearing of any proceeding to review any order under this chapter [Act] the same requirements as to precedence and expedition shall apply.

Sec. 10. (5 U. S. C. sec. 1040.) An order granting or denying an interlocutory injunction under section 1039 (b) of this title shall be subject to review by the Supreme Court of the United States upon writ of certiorari as provided in section 1254 (1) of Title 28: *Provided,* That application therefor be duly made within forty-five days after the entry of such order. The final judgment of the court of appeals in a proceeding to review under this chapter [Act] shall be subject to review by the Supreme Court of the United States upon a writ of certiorari in accordance with the provisions of section 1254 (1) of Title 28: *Provided further,* That application therefor be duly made within ninety days after the entry of such judgment.

Either the United States or the agency or an aggrieved party may file such petition for a writ of certiorari. The provisions of section 1254 (3) of Title 28, regarding certification, and of section 2101 (e)[1] of Title 28, regarding stays, shall also apply to proceedings under this chapter [Act].

* * * *

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[1] Sub-section (e) must have been inadvertently referred to, in place of sub-section (f). The latter provides for stays pending certiorari, whereas the former does not deal with stays. The error seems to have crept into the statute due to the circumstance that when the Hobbs bill was introduced, the present sub-section (f) was designated subdivision (e); but that before the Hobbs bill was enacted, due to an amendment of 28 U. S. C. § 2101, in the meantime (Act of May 24, 1949, § 106 (b), 63 Stat. 104) the former subdivision (e) had become subdivision (f).

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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. ——

FEDERAL MARITIME BOARD, PETITIONER

v.

UNITED STATES OF AMERICA AND ISBRANDTSEN COMPANY, INC.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner Federal Maritime Board respectfully prays for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit, to review an order of that Court filed January 21, 1954, setting aside an order of the Board refusing to postpone or suspend contract/non-contract rates of the Japan-Atlantic and Gulf Freight Conference pending a hearing on protests to such rates.

A certified transcript of the record in this case has been furnished by Japan-Atlantic and Gulf

Freight Conference, petitioner in Docket No. 700, October Term, 1953.

OPINION BELOW

The Opinion of the Circuit Court of Appeals (R. 249) is reported in —— F. 2d ——. One judge dissented in a brief opinion (R. 259).

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on January 21, 1954 (R. 261). The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254 (1), as prescribed by 5 U. S. C. Section 1040 (Section 10, 64 Stat. 1132).

QUESTIONS PRESENTED

Section 15 of the Shipping Act, 1916 (46 U. S. C. Section 814), authorizes the Federal Maritime Board to approve agreements among common carriers by water fixing rates or giving special rates. Such agreements, upon approval, are exempt from the anti-trust laws. Associations of carriers, known as conferences, organized for the purpose of fixing collective rates and practices, can lawfully function in concert only after Board approval. The organic agreements of conferences setting up the machinery for collective rate fixing have since enactment of the Shipping Act been deemed to require prior Board approval; in contrast, the specific conference rates or tariffs have been considered to be day to day routine activities of the conference, falling

within the scope of the collective activities authorized by the approved organic agreement. Such rates and tariffs, although not requiring prior separate approval, must nevertheless meet the standards of Sections 14–17 of the Act, by which the lawfulness of all rates and tariffs must be measured.

This construction of Section 15 has consistently been followed, so as to require specific prior approval of organic agreements of conferences but not of particular rates and tariffs, including so-called contract/non-contract rates under which a differentially lower rate is charged to shippers who sign contracts giving exclusive patronage to conference carriers.

After the decision in *Isbrandtsen Co., Inc.* v. *United States,* 96 F. Supp. 883 (S. D. N. Y. 1951), affirmed by an equally divided Supreme Court in *A/S J. Ludwig Mowinckels Rederi, et al.,* v. *Isbrandtsen Co., Inc.,* 342 U. S. 950 (1952), the Board promulgated General Order 76 (46 C. F. R. Part 236, 17 F. R. 10175) (R. 78) which requires conference carriers proposing to initiate contract/non-contract rates to file with the Board, on thirty days' prior notice, a statement setting forth the reasons for the use of contract/non-contract rates in the conference trade and the basis of the differential between said rates. General Order 76 effects no change in the Board's interpretation of Section 15 and is intended to provide information necessary to enable the

Board to review contract/non-contract rates then or thereafter in effect.

The Board's order in this case denied requests to suspend contract/non-contract rates proposed by the Japan-Atlantic and Gulf Freight Conference pending a hearing on protests thereto, but granted the hearing as requested. The Court of Appeals set aside the Board's order and permanently enjoined the conference from intiating contract/non-contract rates in its trade.

The fundamental questions are:

1. Whether Section 15 of the Shipping Act, 1916, requires the Board to give prior, separate approval to contract/non-contract rates of common carriers whose conference agreement, approved by the Board, provides for and contemplates the collective fixing of lawful rates.

2. Whether an order of the Board refusing to suspend contract/non-contract rates of conference carriers pending a hearing on protests thereto is a final order reviewable under 5 U. S. C. Section 1032.

STATUTES INVOLVED

The pertinent statutory provisions are printed in Appendix A, *infra,* pp. 29–40. They are Sections 14–17, inclusive, and 22–25, inclusive, Shipping Act, 1916, as amended (39 Stat. 733 et seq.; 46 U. S. C. Sections 812–816, inclusive, and 821–824, inclusive); and Sections 2, 4, 9, and 10, Review Act of 1950 (64 Stat. 1129–1132; 5 U. S. C. Sections 1032, 1034, 1039, and 1040).

STATEMENT OF THE CASE

On December 24, 1952, the Japan-Atlantic and Gulf Freight Conference, a conference of common carriers in the foreign commerce of the United States approved by the Board[1] under Section 15, filed a Statement (R. 82) with the Board, pursuant to General Order 76, giving notice that thirty days thereafter it proposed to initiate contract/non-contract rates in the conference trade. Under this proposal, shippers entering into exclusive patronage contracts with the conference carriers would be charged a differential in rates approximately 9½ percent below the rates chargeable to shippers who do not sign contracts. As required by General Order 76,[2] the Conference Statement, accompanied by affidavits, set forth the reasons for the use of contract/non-contract rates and the basis for the differential between said rates (R. 82–139).

[1] "Board," as used herein, refers to the Federal Maritime Board and its predecessor agencies. The United States Shipping Board was created by the Shipping Act, 1916 (46 U. S. C. 801, 39 Stat. 728) and was succeeded by the Secretary of Commerce by Executive Order 6166, June 10, 1933, the United States Maritime Commission by the Merchant Marine Act, 1936, section 204 (a) (46 U. S. C. 1114, 49 Stat. 1987), and the Federal Maritime Board by Reorganization Plan No. 21, section 104 (15 F. R. 3178).

[2] General Order 76 was promulgated by the Board, effective November 11, 1952, as a procedural rule requiring, insofar as here pertinent:

"#236.3 *Filing for initiation of contract/non-contract rates.*—Steamship freight conferences proposing to establish contract/non-contract rates to become effective after the

Pursuant to the General Order, notice of the Conference filing was published in the Federal Register, and twenty days were allowed for submission by interested parties of protests or comments relating to the proposal. Isbrandtsen Company, Inc., the only substantial carrier in the trade who is not a member of the Conference, and the Department of Justice duly filed protests (R. 140–180 and 215–216, respectively), the former attaching an affidavit alleging that initiation of the rates would result in irreparable harm (R. 161–170). Each requested that the

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effective date of this Rule shall file with the Federal Maritime Board at least 30 days prior to the initiation of such rates, a statement containing:

"(a) The amount of the spread or differential in terms of percentages or dollars and cents:

"(b) the effective date;

"(c) the reasons for the use of contract/non-contract rates in the particular trade involved, and the basis for the spread or differential between such rates; and

"(d) copies of the form of all contracts pertaining thereto.

* * * * *

"#236.6 *Notice.*—All information filed pursuant to this Rule shall be available for inspection by interested parties at the Regulation Office of the Board. A notice of the filing of the statement required under sections 236.2 and 236.3 above will be published in the Federal Register as soon as practicable. Except as may be otherwise provided in cases arising under section 236.4, interested parties shall have twenty (20) days after the date of such publication within which to submit written comments relating to the information filed with the Board pursuant to this Rule. Said comments may include a statement of position with respect to approval, disapproval, or modification, together with a request for hearings, should such hearing be desired."

Board set its protest for hearing (R. 158, 216). Isbrandtsen urged the Board "pending such a hearing, to postpone and suspend the initiation of [the] dual rate system" (R. 158–159); the Department of Justice prayed "that the Board suspend, and/or dismiss, disapprove, or cancel the proposed rate system" (R. 216).

On January 21, 1953, the Board issued the order (R. 220) which has been set aside by the Court below. The order granted the requests of Isbrandtsen and the Department of Justice for hearing on their protests, but denied their requests for suspension of the contract/non-contract rates pending such hearing. The pertinent portion of the Board's order (following a recital of the receipt of the Conference filing and of the comments and protests of Isbrandtsen and the Department of Justice, and of the Board's consideration of such papers) reads as follows:

> It Appearing therefrom that the Statement of the Conference filed December 24, 1952 complies with the requirements of General Order 76; and
>
> It Not Appearing from any of the above documents or other information now before the Board that the differential between said contract/non-contract rates is arbitrary, unreasonable, or unjustly discriminatory, nor that the initiation of the proposed contract/non-contract rate system will be unjustly discriminatory or unfair or detrimental to the commerce of the

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United States, or will be in violation of the Shipping Act, 1916, as amended, or will cause irreparable damage to Isbrandtsen Co., Inc.;

It is ordered, that the requests of the Department of Justice and of Isbrandtsen Co., Inc. for a suspension of the proposed contract/non-contract rates of the Japan-Atlantic and Gulf Freight Conference in the trade between Japan, Korea, and Okinawa and United States Atlantic and Gulf ports, pending hearing and determination, be denied; and

It is further ordered, That the requests of the Department of Justice and of Isbrandtsen Co., Inc. for a hearing on the said Protest and Comments be granted; and

It is further ordered, That such hearing be held before an Examiner of the Federal Maritime Board at a time and place to be fixed.

Thereupon, Isbrandtsen applied to the Court below for a stay of and a temporary injunction against the Board's order, pending that Court's review of the Board's action. A temporary injunction was granted, *per curiam,* one judge dissenting (R. 239–243). Petitions for certiorari, filed in this Court by the Board and the Conference seeking review of the grant of temporary injunction, were denied by this Court.[3]

[3] 345 U. S. 975 (1953).

Following its consideration of the case on the merits, the Court below, one judge dissenting, set aside the Board's order by its opinion and judgment of January 21, 1954, and permanently enjoined the Conference from initiating contract/non-contract rates in the trade.

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals erred:

1. In construing as a new agreement or as a modification of an existing agreement, so as to require prior approval, contract/non-contract rates which have been considered within the scope of the approved Conference agreement under the Board's administrative practice of many years. The effect of this construction is to require formal approval anew of matters already authorized by Board approval of the organic Conference agreement; to render largely meaningless the Board's approval of such agreements; to declare unlawful many conference activities, hitherto considered authorized by the Board; to throw into uncertainty the precise scope of permitted concerted activity; and to impose upon the Board the burdensome and rigid duty to review rates and rate practices of conferences before they may go into effect, rather than to employ the more flexible and commonly used administrative device of rate suspension coupled with subsequent hearing on the merits.

2. In exercising authority under 5 U. S. C. 1032, which permits review only of final orders, over the purely interlocutory order of the Board which expressly directed that a hearing be held on protests to the lawfulness of conference rates and merely denied requests for their suspension pending such hearing. The Court's ruling constitutes a departure from the well settled principle that orders of rate-regulating agencies suspending or declining to suspend proposed rates are neither final nor reviewable.

3. In setting aside the Board's order and thereby substituting its discretion for that of the Board on the question whether rates should be suspended—a matter requiring a high degree of expertise in the specialized field of transportation in the foreign commerce of the United States.

4. In finding that the initiation of the rates would remove Isbrandtsen from the trade, thereby substituting its discretion for that of the Board, which had found that it did not appear that Isbrandtsen would be caused irreparable harm.

REASONS FOR GRANTING THE WRIT

SUMMARY OF REASONS

1. The construction of Section 15 of the Shipping Act is of widespread public importance affecting common carriers, shippers and consignees in the foreign commerce of the United States. It is vital to the effective administration of the statute. Under the Board's long standing con-

struction of Section 15, conference rates, including contract/non-contract rates, have not been considered to constitute agreements as to which prior Board approval is required. In the traditional concept of rate-making, conference rates have been deemed lawful until expressly held unlawful by order of the Board after a hearing upon complaint or investigation upon the Board's own motion. The rate structure in all of the trades of the foreign commerce of the United States is made up of rates and tariffs filed with the Board pursuant to approved conference agreements; but the rates themselves have never been given specific prior approval. Whether that substantial part of the foreign commerce rate structure which consists of contract/non-contract rates is unlawful for lack of prior administrative approval is of critical importance to the administration of the Shipping Act and the foreign commerce of the United States. Issuance of the writ is justified in order to present for decision by the Supreme Court the fundamental question whether contract/non-contract rates, as other rates in foreign commerce, are lawful without prior approval and may go into effect unless suspended by the Board pending hearing.

2. The Court of Appeals has no jurisdiction or authority to review an interlocutory order of the Board. An order refusing to suspend rates pending a hearing—which is the full effect of the Board's order—is not a final order reviewable

under 5 U. S. C. Section 1032. Such an order represents the exercise of administrative discretion on a purely interlocutory issue and the Court below, in setting it aside, has substituted its discretion for that of the Board.

1. THE PUBLIC IMPORTANCE OF THIS ISSUE UPON THE EFFECTIVE ADMINISTRATION OF THE SHIPPING ACT

Under Section 15 of the Shipping Act, 1916 (46 U. S. C. Section 814), "every" rate-fixing agreement between common carriers by water in the foreign commerce of the United States must be filed with the Board for approval. Without prior Board approval, such an agreement between carriers is violative of the Shipping Act, 1916. In addition, Board approval extends to such concerted action exemption from the anti-trust laws.

The phrase "every agreement" in Section 15 created wide-spread uncertainty among conferences of ocean carriers as to the precise extent of its applicability to conference practices. Strictly speaking, day-to-day rate fixing or routine tariff activities by the conference are agreements between the member lines, and it became essential for the Board to construe the exact scope of the statutory reference to "every agreement."

To this end, the Board, in ***Ex Parte 4, Section 15 Inquiry,*** 1 U. S. S. B. 121, 124–125 (1927), conducted a formal rule-making proceeding, in which 192 carriers participated. The Board concluded that Section 15 called for the filing and approval, not of *every* concerted action by car-

riers, but only of those "agreements whereby the carriers *propose to be governed* in their conference activities as to matters specified in the first paragraph of [section 15] * * * such agreements are to be distinguished from the routine of conference activities." [Emphasis supplied.]

The rule thus stated has been consistently administered through the years so as to require approval of organic agreements of conferences which frame the outlines of conference activity but not of every action taken pursuant thereto. This rule has been the premise of a workable and equitable pattern of conference rate regulation. Organic agreements of conferences are formally considered by the Board when submitted for approval. They are given wide notice, and interested persons are granted the opportunity to submit their views to the Board. Upon complaint of an interested party, or upon its own motion where it is deemed necessary, the Board subjects such agreements to the full hearing process. If approval is merited, the organic agreement becomes, as it were, a charter or franchise which delimits the scope of lawful collective activity by the conference members. The subsequent fixing of rates and tariff regulations by a conference whose approved organic agreement provides for such activity is not and has never been considered an agreement or modification of an agreement within the meaning of Section 15 requiring specific prior approval. Never-

theless, no imprimatur of legality attaches to the conference rates themselves by virtue of approval of the organic agreement. Only the authority to fix rates collectively has been approved. The rates themselves are always subject to the traditional rate-making criteria of unjust discrimination and detriment to commerce as set up in such Sections as 14, 15, 16, and 17 of the Shipping Act. Under Section 22 (46 U. S. C. Section 821) any person upon complaint, or the Board on its own motion, may attack the lawfulness of any rate. Further, the Board is empowered, by Section 22, to award reparations to complainants injured by violations of the Act. There is, therefore, ample protection for injured persons if a conference establishes a rate or rates which are obnoxious under the Act.

Additional protection is available to the public. The Board is vested with plenary power over all conference activity, including rate-making, by reason of its broad jurisdiction over conference agreements. Under Section 15 "the Board may by order disapprove, cancel, or modify any agreement, or any modification or cancelation thereof, whether or not previously approved by it," that it finds to be unjustly discriminatory, or to operate to the detriment of commerce, or to be in violation of the Shipping Act. Under Section 25 (46 U. S. C. Section 824) the Board may reverse, suspend or modify, upon such notice and in such manner as it deems proper, any order

made by it. Where a conference action, such as the institution of contract/non-contract rates, is found to be unjustly discriminatory or otherwise violative of the Act, the Board is empowered to modify or cancel the conference's organic agreement.[4] The broad authority thus conferred upon the Board over the concerted action of carriers under their conference agreements carries with it the necessary discretion to establish procedures and formulate rules in aid of an effective administration of the statutory scheme of regulation. As an incident to such broad regulatory authority, the Board may direct the conference to suspend rates under sanction of cancelation of the basic conference agreement where such action is appropriate to effectuate the statutory purpose and policy. "Finding a wrong which it is duty bound to remedy, the Maritime Commission, as the expert body established by Congress for safeguarding this specialized aspect of the national interest, may, within the framework of the Ship-

[4] For example, in *Port Differential Investigation*, 1 U. S. S. B. 61 (1925), the Board exercised its plenary power over carriers acting in concert pursuant to a section 15 agreement. Finding that the agreement operated unfairly as between carriers, the Board disapproved and canceled it. Similarly, in *Contract Routing Restrictions*, 2 U. S. M. C. 220 (1939), and in *Contract Rates—North Atlantic Continental Freight Conference*, Docket No. 724, 4 F. M. B. 98 (1952), the Board required a conference to desist from initiating contract/non-contract rates, under penalty of cancelation of the organic conference agreement.

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ping Act, fashion tools for so doing." *California* v. *United States,* 320 U. S. 577, 584 (1944).

General Order 76 is a procedure established by the Board to assist it in the performance of its statutory responsibility to regulate the concerted activities of conference carriers. It requires the submission of information in advance of the effective date of contract/non-contract rates, with respect to their need in the trade and the reasonableness of the differential between such rates.[5] This information together with the comments of all interested parties submitted in response to the publication of the conference Statement enables the Board to exercise an informed judgment on the preliminary question whether the contract/non-contract rates proposed by the conference should be permitted to go into effect or suspended pending a hearing. Where there is likelihood that the rates will ultimately be found unlawful or where upon a balancing of the equities, the Board exercises its discretion in favor of the protesting parties, conferences have been directed

[5] General Order 76 was promulgated by the Board following the decision in *Isbrandtsen* v. *United States*, 96 F. Supp. 883 (S. D. N. Y. 1951, aff'd. 342 U. S. 950, by an evenly divided Supreme Court). That decision held that where the spread between the particular contract and the non-contract rates had been fixed arbitrarily, the rates were "unreasonably, and therefore unjustly, discriminatory; and the dual rate provisions which permit such rates are invalid." *Ibid.*, p. 889.

not to put rates into effect.[6] If, as in the instant case, the Board on balancing the equities declines to suspend, protesting parties may nonetheless avail themselves of all the remedies provided by the Shipping Act, including, under Section 22, the right to reparation, if upon subsequent hearing the rates are found by the Board to be unlawful.

This is the established pattern by which the Board regulates the rate activities of conferences which exist and function under Board-approved agreements in every essential trade route in the foreign commerce of the United States.[7] It results from the practical application of the regulatory authority created by statute; and it conforms with accepted patterns of rate regulation in other fields. There are sound reasons for the principle that prior approval is not required for individual rate-fixing actions of conferences. To require such prior approval would thrust upon the Board an intolerable burden of detail far in excess of the responsibility of any other regulatory agency

[6] *In the Matter of the Statement of the Trans-Pacific Freight Conference*, Docket 743; Contract Rates—*North Atlantic Continental Freight Conference*, Docket 724, 4 F. M. B. 98 (1952).

[7] Under section 211 (a) of the Merchant Marine Act, 1936 (46 U. S. C. section 1121) the Maritime Administrator, by delegation of the Secretary of Commerce, successor to the former United States Maritime Commission with respect to such functions, is charged with the duty to determine the ocean services, routes, and lines which are essential for the promotion, development, expansion, and maintenance of the foreign commerce of the United States.

in the field of transportation. In the export and import foreign trade of the United States rates are established for thousands of different commodities carried by conference members. Currently on file with the Board are 137 separate conference tariffs, 62 of which include contract/non-contract rates applicable to some or all commodities. In the ordinary course of business, the Board receives an average of 2,000 individual filings of rates or groups of rates per month. Fundamental changes in the Board's long-established practice will necessarily have a profound effect upon the daily activities of conferences governed by, and relying upon, that practice. Surely, the statutory construction followed for so long by the administrative agency in its practical experience is entitled to great weight. *Hirshberg* v. *Cooke,* 336 U. S. 210 (1949); *Commissioner* v. *Flowers,* 326 U. S. 465, 469 (1946); *Boehm* v. *Commission,* 326 U. S. 287, 292 (1945); *Helvering* v. *Winmill,* 305 U. S. 79, 83 (1938); *United States* v. *Shreveport Grain and Elevator Co.,* 287 U. S. 77, 84 (1932).

The conference agreement which is here involved is typical of many basic conference agreements which have been approved by the Board and pursuant to which rates are fixed. It provides for "the establishment, regulation and maintenance of agreed rates and charges" and that "there shall be no undue preference or unreasonable discrimination nor unfair practice

against any consignor or consignee by any of the parties hereto" and that "the giving or receiving of special rates * * * not offered to all shippers shipping under similar conditions is prohibited." These provisions—substantially as broad in their delineation of permissible rate fixing as the standards of lawfulness set forth in the Shipping Act itself—have been construed by the Board to constitute an agreement between carriers to fix rates which are not unlawful, including contract/non-contract rates as well as other types of differentially fixed rates. In approving the organic agreement, the Board regarded its approval as authorizing the establishment of a rate making machinery whereby the Conference could establish rates, including contract/non-contract rates, for the cargoes moving in the conference trade, subject to continuing regulatory authority. Thus, prior to World War II, this Conference, like other similarly situated conferences, established contract/non-contract rates which were used in the conference trade under Board surveillance and in reliance upon the administrative construction that the fixing of such rates was authorized by approval of the basic conference agreement. To require the conference to obtain prior formal administrative approval of such rates apart from the approval of the conference agreement making such rates possible would virtually destroy the flexibility of rate making essential to the business of ocean transportation.

The burden thereby thrust on the Board would tend to make its approvals a mere formality affording little protection to the public inasmuch as it would throw a cover of official condonation upon what could not even be properly investigated.

The Court below gave no heed to the effect of its decision upon the administrative agency, its practice over the years and the reliance of the trade upon it for their day-to-day business affairs. Whether a given conference activity constitutes an "agreement" within Section 15 is within the Board's primary exclusive jurisdiction. *Far East Conference* v. *United States,* 342 U. S. 570 (1952); *U. S. Navigation Co.* v. *Cunard S. S. Co.,* 284 U. S. 474, 486 (1932). Yet the Court below, with no clear explication of its reasoning, has held that the contract/non-contract rates proposed by the Conference constituted an "agreement" and that the Board erred in following its established administrative practice in considering the contract/non-contract rates within the Board-authorized scope of conference activity. It held, therefore, that this conference's organic agreement and the Board's approval thereof, which was intended to cover the collective fixing of all rates which are lawful, did not cover contract/non-contract rates. Thus, in effect the Court apparently reasoned either that contract/non-contract rates are *per se* unlawful or that, if not *per se* unlawful, the Board's approval, contrary to the

Board's intent, extended to the collective fixing of all lawful rates except contract/non-contract rates. That contract/non-contract rates are not *per se* unlawful under the Shipping Act, 1916, is clearly indicated in the legislative history. See Report of the House Committee on the Merchant Marine and Fisheries (the so-called Alexander Committee), H. R. Doc. 805, 63d Cong., 2d Sess., pp. 290, 295, 307; 53 Cong. Rec. 8077, 8095. Furthermore, this Court has at least inferentially so held. *Swayne & Hoyt, Ltd.* v. *United States,* 300 U. S. 297, 304, 307 (n. 3) (1936).

Serious effects would necessarily follow if the opinion below is to be controlling. Practically all of the American-flag steamship lines operating regular or berth services from United States ports to all parts of the world are members of conferences, one or more of which use contract/non-contract rates.[8] There are 105 conferences serving this nation's foreign trade whose basic agreements provide for collective rate-making; of these, 62 conferences employ contract/non-contract rates. Only 9 of these 62 have in their organic agreements an express provision for the use of contract/non-contract rates; the great majority have no such express provision, and they are in a position similar to the Japan-Atlantic and Gulf Freight Conference. These 53 conferences presently employ contract/non-contract

[8] Of a total of 38 American-flag liner operators in the foreign trades, 36 are members of one or more conferences.

rates, as did the subject Conference prewar, in reliance upon the Board's long-standing construction of Section 15 that prior separate approval was unnecesary.[9] The consequence of the decision below would apparently render unlawful all such rates, for lack of affirmative approval. This in turn would give rise to a multiplicity of litigation for violation of the Shipping Act and claims for reparations by shippers who have paid and are now paying higher non-contract rates. Moreover, the use of contract/non-contract rates by such conferences, being in the opinion of the Court below an "agreement" requiring prior approval, would no longer be exempt from the anti-trust laws with possible concomitant civil and criminal consequences.

As above indicated, because of the implications in the decision below, uncertainty now exists as to the Board's regulatory duties with respect to conference agreements for rate fixing where contract/non-contract rates are now being used or hereafter may be used, if approval is necessary. Even where an approved organic agreement ex-

[9] Of the aforementioned 53 conferences, 22 have either made reference to contract/non-contract rates in subsequent amendments which have been given Board approval, or include in their organic agreements provisions implying (although not expressly referring to) the use of such rates, or have been the subject of formal docket decisions of the Board recognizing their use of contract/non-contract rates. Three other conferences which do not presently employ such rates have received similar implied approval of their use.

pressly provides in terms for contract/non-contract rates, prior approval may still be required. Nine conference agreements make such provision and, of these, seven conferences do not at the present time use such rates. Further, the Board's duties are in doubt with respect to proposals for the extension of contract/non-contract rates to additional items in their filed tariffs,[10] or to increase or decrease the differential between the thousands of particular contract and non-contract rates in use now or in the future. Strictly speaking, all such conference activity constitutes agreements or understandings between carriers within the meaning of Section 15 as construed by the Court below. If specific approval of changes in contract/non-contract rates is required, it is plain that the Board will be overwhelmed not only by the heavy administrative burden of reviewing, analyzing and approving rates in advance of their becoming effective, but also by its additional responsibility in connection with consequent litigation caused by the unlawfulness of those rates which have been in use without prior approval.

In addition to such heavy burdens, other problems of fundamental import to the Board will complicate its administrative practice of long standing. The flexible device of rate-suspension will be unavailable to the Board. It will be de-

[10] There are 16 conferences which use contract/non-contract rates in connection with some, but not all, commodities.

void of authority to exercise discretion upon a balancing of the equities occasioned by the needs and particular conditions of the trade in foreign commerce. Instead, all contract/non-contract rates will rigidly require prior approval—presumably predicated upon full hearing—notwithstanding such considerations as may dictate undelayed use of the rates to prevent cut-throat competition and rate war. The requirement of prior approval would also presumably necessitate review of all existing contract/non-contract rates so as to permit their use only after specific approval.[11] The magnitude of such a labor would make it difficult, if not impossible, for the Board to give more than superficial attention to each rate and reduce approval to a rubber-stamp process affording no safeguard to the public interest. Carriers on the one hand might be lulled into assuming that anti-trust exemption had been granted; shippers on the other hand might lose the protection now provided them by virtue of the mere formality of approval.

[11] Indeed, the reasoning of the Court below, carried to its strictly logical conclusion, would seem to dictate the need for separate prior approval for all rates of conferences, as well as contract/non-contract rates. It is manifest that the Board could not review and approve all conference rate filings, which exceed 2,000 individual rates or groups of rates (some of which include hundreds of individual rates), during an average month.

2. THE BOARD'S ORDER WAS NOT FINAL AND ITS REVIEW WAS BEYOND THE AUTHORITY OF THE COURT BELOW

In reviewing a Board order declining to suspend rates, the Court below departed from the well settled principle that such orders are interlocutory, as well as discretionary, and hence unreviewable. *Carlsen* v. *United States,* 107 F. Supp. 398 (S. D. N. Y. 1952); *Algoma Coal and Coke Co.* v. *United States,* 11 F. Supp. 487 (E. D. Va. 1935); *Kiser Co.* v. *Central of Georgia Ry. Co.,* 236 F. 573 (S. D. Ga. 1916), aff'd. 239 F. 718 (C. A. 5th, 1917). See *Board of Railroad Commissioners* v. *Great Northern Ry. Co.,* 281 U. S. 412, 429 (1929).[12] Because the jurisdiction of the Court derives from 5 U. S. C. Section 1032, which in terms deals only with final orders, the decision is fundamentally in error in that the Board's order was not an approval of rates but purely interlocutory. The application of Isbrandtsen and the Department of Justice expressly asked for postponement or suspension of the rates pending a hearing on their protests. The Board denied such application and declined

[12] Orders of the Interstate Commerce Commission temporarily suspending rates are similarly not amenable to judicial review. *Manhattan Transit Co.* v. *United States,* 24 F. Supp. 174 (D. Mass., 1938). See *Illinois Commerce Commission* v. *Thomson,* 318 U. S. 675 (1943). The Court below erred further in purporting to distinguish between the suspension power of the Interstate Commerce Commission and that of the Board.

to suspend the rates but it set down for hearing the lawfulness of the rates. Clearly the order was not an approval of rates since the Court below held that such rates are unlawful until and unless approved by the Board.[13] A refusal to suspend may not be considered an approval of rates. To characterize such an order as final does violence to its plain language and meaning, and completely disregards that every remedy made available by the Shipping Act is left open to the protestants. The criterion of finality laid down in *Chicago and Southern Air lines* v. *Waterman Steamship Corp.*, 333 U. S. 103, 113 (1948), cited by the majority of the Court below, can only sustain a conclusion opposite to that reached by the Court. For if administrative orders are ordinarly reviewable when "they impose an obligation, deny a right, or fix some legal relationship as a consummation of the administrative process," then surely an administrative order is not reviewable if it does no more than decline to suspend rates, subject to final determination on the merits after full hearing. Clearly, such an order effects no change in the obligations, rights, or legal relationships of the parties.

[13] The order of the Court below granted a temporary injunction against so much of the Board's order "as purported to *approve*, or to authorize and permit the institution" by the conference of contract/non-contract rates. [Emphasis supplied.]

Furthermore, the Court below erred in substituting its discretion for that of the agency. The decision to suspend or not to suspend is one inherently impressed with specialized considerations. It calls for "insight and aptitude which can hardly be matched by judges who are called upon to intervene at fitful intervals." *R. R. Commission* v. *Rowan & Nichols Oil Co.,* 311 U. S. 570, 575 (1941). Where, as here, the decision must chiefly depend upon a considered analysis of its results upon the foreign commerce of the nation, the agency's expertise should be entitled to great deference. Yet, the Court below in effect suspended the rates where the Board had considered suspension to be unjustified. It lightly dismissed the Board's view of the balance of equities, saying, "since Isbrandtsen, carrying slightly less than one third of the total volume of trade on the Japan-Atlantic route, is the only non-member line competing with Conference vessels, the impact of this system upon Isbrandtsen is readily apparent." It concluded that, "by denying Isbrandtsen's request to postpone operation of the dual rate system and to grant an immediate hearing, the Board virtually removed Isbrandtsen from the shipping market involved." In so concluding, the Court substituted its appraisal of the commercial situation for the Board's, and so departed from its appropriate role as a reviewer of administrative action.

We think the decision below is in error. It is pregnant with fundamental revisions in an administrative pattern conformed by long practice to the needs of ocean shipping. Far-reaching and basic alterations in this pattern, necessary if the decision below is to stand, will materially affect the foreign commerce of the United States.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX A

Section 14, Shipping Act, 1916, as amended, 39 Stat. 733, 46 U. S. C. sec. 812:

> SEC. 14. That no common carrier by water shall, directly or indirectly, in respect to the transportation by water of passengers or property between a port of a State, Territory, District, or possession of the United States and any other such port or a port of a foreign country—
>
> First. Pay, or allow, or enter into any combination, agreement, or understanding, express or implied, to pay or allow, a deferred rebate to any shipper. The term "deferred rebate" in this Act means a return of any portion of the freight money by a carrier to any shipper as a consideration for the giving of all or any portion of his shipments to the same or any other carrier, or for any other purpose, the payment of which is deferred beyond the completion of the service for which it is paid, and is made only if, during both the period for which computed and the period of deferment, the shipper has complied with the terms of the rebate agreement or arrangement.
>
> Second. Use a fighting ship either separately or in conjunction with any other carrier, through agreement or otherwise. The term "fighting ship" in this Act means a vessel used in a particular trade by a carrier or group of carriers for the purpose of excluding, preventing, or reducing competition by driving another carrier out of said trade.

Third. Retaliate against any shipper by refusing, or threatening to refuse, space accommodations when such are available, or resort to other discriminating or unfair methods, because such shipper has patronized any other carrier or has filed a complaint charging unfair treatment, or for any other reason.

Fourth. Make any unfair or unjustly discriminatory contract with any shipper based on the volume of freight offered, or unfairly treat or unjustly discriminate against any shipper in the matter of (a) cargo space accommodations or other facilities, due regard being had for the proper loading of the vessel and the available tonnage; (b) the loading and landing of freight in proper condition; or (c) the adjustment and settlement of claims.

Any carrier who violates any provision of this section shall be guilty of a misdemeanor punishable by a fine of not more than $25,000 for each offense.

Section 14a, Shipping Act, 1916, as amended, 39 Stat. 733, as amended, 46 U. S. C. sec. 813:

SEC. 14a. The Board upon its own initiative may, or upon complaint shall, after due notice to all parties in interest and hearing, determine whether any person, not a citizen of the United States and engaged in transportation by water of passengers or property—

(1) Has violated any provision of section 14, or

(2) Is a party to any combination, agreement, or understanding, express or implied, that involves, in respect to transportation of passengers or property between foreign ports, deferred rebates or any other unfair practice designated in section 14.

and that excludes from admission upon equal terms with all other parties thereto, a common carrier by water which is citizen of the United States and which has applied for such admission.

If the board determines that any such person has violated any such provision or is a party to any such combination, agreement, or understanding, the board shall thereupon certify such fact to the Secretary of Commerce. The Secretary shall thereafter refuse such person the right of entry for any ship owned or operated by him or by any carrier directly or indirectly controlled by him, into any port of the United States, or any Territory, District, or possession thereof, until the board certifies that the violation has ceased or such combination, agreement, or understanding has been terminated.

Section 15, Shipping Act, 1916, as amended, 39 Stat. 733, 46 U. S. C. sec. 814.

SEC. 15. That every common carrier by water, or other person subject to this Act, shall file immediately with the board a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this Act, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports;

limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term "agreement" in this section includes understandings, conferences, and other arrangements.

The board may by order disapprove, cancel, or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be in violation of this Act, and shall approve all other agreements, modifications, or cancellations.

Agreements existing at the time of the organization of the board shall be lawful until disapproved by the board. It shall be unlawful to carry out any agreement or any portion thereof disapproved by the board.

All agreements, modifications, or cancellations made after the organization of the board shall be lawful only when and as long as approved by the board, and before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation.

Every agreement, modification, or cancellation lawful under this section shall be excepted from the provision of the Act approved July second, eighteen hundred and ninety, entitled "An Act to protect trade and commerce against unlawful re-

straints and monopolies", and amendments and acts supplementary thereto, and the provisions of sections seventy-three to seventy-seven, both inclusive, of the Act approved August twenty-seventh, eighteen hundred and ninety-four, entitled "An Act to reduce taxation, to provide revenue for the Government, and for other purposes", and amendments and acts supplementary thereto.

Whoever violates any provision of this section shall be liable to a penalty of $1,000 for each day such violation continues, to be recovered by the United States in a civil action.

Section 16, Shipping Act, 1916, as amended, 39 Stat. 734, 46 U. S. C. sec. 815:

SEC. 16. That it shall be unlawful for any shipper, consignor, consignee, forwarder, broker, or other person, or any officer, agent, or employee thereof, knowingly and willfully, directly or indirectly, by means of false billing, false classification, false weighing, false report of weight, or by any other unjust or unfair device or means to obtain or attempt to obtain transportation by water for property at less than the rates or charges which would otherwise be applicable.

That it shall be unlawful for any common carrier by water, or other person subject to this Act, either alone or in conjunction with any other person, directly or indirectly—

First. To make or give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever, or to subject any particular person, locality, or description of traffic to any undue

or unreasonable prejudice or disadvantage in any respect whatsoever.

Second. To allow any person to obtain transportation for property at less than the regular rates or charges then established and enforced on the line of such carrier by means of false billing, false classification, false weighing, false report of weight, or by any other unjust or unfair device or means.

Third. To induce, persuade, or otherwise influence any marine insurance company or underwriter, or agent thereof, not to give a competing carrier by water as favorable a rate of insurance on vessel or cargo, having due regard to the class of vessel or cargo, as is granted to such carrier or other person subject to this Act.

Whoever violates any provision of this section shall be guilty of a misdemeanor punishable by a fine of not more than $5,000 for each offense.

Section 17, Shipping Act, 1916, as amended, 39 Stat. 734, 46 U. S. C. sec. 816:

SEC. 17. That no common carrier by water in foreign commerce shall demand, charge, or collect any rate, fare, or charge which is unjustly discriminatory between shippers or ports, or unjustly prejudicial to exporters of the United States as compared with their foreign competitors. Whenever the board finds that any such rate, fare, or charge is demanded, charged, or collected it may alter the same to the extent necessary to correct such unjust discrimination or prejudice and make an order that the carrier shall discontinue demanding, charging, or collecting any such un-

justly discriminatory or prejudicial rate, fare, or charge.

Every such carrier and every other person subject to this Act shall establish, observe, and enforce just and reasonable regulations and practices relating to or connected with the receiving, handling, storing, or delivering of property. Whenever the board finds that any such regulation or practice is unjust or unreasonable it may determine, prescribe, and order enforced a just and reasonable regulation or practice.

Section 22, Shipping Act, 1916, as amended, 39 Stat. 736, 46 U. S. C. sec. 821:

SEC. 22. That any person may file with the board a sworn complaint setting forth any violation of this Act by a common carrier by water, or other person subject to this Act, and asking reparation for the injury, if any, caused thereby. The board shall furnish a copy of the complaint to such carrier or other person, who shall within a reasonable time specified by the board satisfy the complaint or answer it in writing. If the complaint is not satisfied the board shall, except as otherwise provided in this Act, investigate it in such manner and by such means, and make such order as it deems proper. The board, if the complaint is filed within two years after the cause of action accrued may direct the payment on or before a day named, of full reparation to the complainant for the injury caused by such violation.

The board, upon its own motion, may in like manner and except as to orders for the payment of money with the same powers, investigate any violation of this Act.

Section 23, Shipping Act, 1916, as amended, 39 Stat. 736, 46 U. S. C. sec. 822:

SEC. 23. Orders of the board relating to any violation of this Act shall be made only after full hearing and upon a sworn complaint or in proceedings instituted of its own motion.

All orders of the United States Maritime Commission, other than for the payment of money, made under this Act, as amended or supplemented shall continue in force until its further order or for a specified period of time, as shall be prescribed in the order, unless the same shall be suspended, or modified, or set aside by the Commission, or be suspended or set aside by a court of competent jurisdiction.

Section 24, Shipping Act, 1916, as amended, 39 Stat. 736, 46 U. S. C. sec. 823:

SEC. 24. That the board shall enter of record a written report of every investigation made under this Act in which a hearing has been held stating its conclusions, decision, and order, and, if reparation is awarded, the findings of fact on which the award is made, and shall furnish a copy of such report to all parties to the investigation.

The board may publish such reports in the form best adapted for public information and use, and such authorized publications shall, without further proof or authentication, be competent evidence of such reports in all courts of the United States and of the States, Territories, Districts, and possessions thereof.

Section 25, Shipping Act, 1916, as amended, 39 Stat. 736, 46 U. S. C. sec. 824:

> SEC. 25. That the board may reverse, suspend, or modify, upon such notice and in such manner as it deems proper, any order made by it. Upon application of any party to a decision or order it may grant a rehearing of the same or any matter determined therein, but no such application for or allowance of a rehearing shall, except by special order of the board, operate as a stay of such order.

Sections 2, 4, 9 and 10, Public Law 901, 81st Congress, 64 Stat. 1129–1132, 5 U. S. C. sections 1032, 1034, 1039, 1040:

> SEC. 2. The court of appeals shall have exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of, all final orders (a) of the Federal Communications Commission made reviewable in accordance with the provisions of section 402 (a) of the Communications Act of 1934, as amended, and (b) of the Secretary of Agriculture made under the Packers and Stockyards Act, 1921, as amended, and under the Perishable Agricultural Commodities Act, 1930, as amended, except orders issued under sections 309 (e) and 317 of the Packers and Stockyards Act and section 7 (a) of the Perishable Agricultural Commodities Act, and (c) such final orders of the United States Maritime Commission or the Federal Maritime Board or the Maritime Administration entered under authority of the Shipping Act, 1916, as amended, and the Intercoastal Shipping Act, 1933, as

amended, as are now subject to judicial review pursuant to the provisions of section 31, Shipping Act, 1916, as amended.

Such jurisdiction shall be invoked by the filing of a petition as provided in section 4 hereof.

SEC. 4. Any party aggrieved by a final order reviewable under this Act may, within sixty days after entry of such order, file in the court of appeals, wherein the venue as prescribed by section 3 hereof lies, a petition to review such order. Upon the entry of such an order, notice thereof shall be given promptly by the agency by service or publication in accordance with the rules of such agency. The action in court shall be brought against the United States. The petition shall contain a concise statement of (a) the nature of the proceedings as to which review is sought, (b) the facts upon which venue is based, (c) the grounds on which relief is sought, and (d) the relief prayed. The petitioner shall attach to the petition, as exhibits, copies of the order, report, or decision of the agency. The clerk shall serve a true copy of the petition upon the agency and upon the Attorney General of the United States by mailing by registered mail, with request for return receipt, a true copy to the agency and a true copy to the Attorney General.

SEC. 9. (a) Upon the filing and service of a petition to review, the court of appeals shall have jurisdiction of the proceeding. The court of appeals in which the record on review is filed, on such filing, shall have jurisdiction to vacate stay orders or interlocutory injunctions theretofore granted by any court, and shall have exclusive jurisdiction to make and enter, upon the petition, evidence, and proceed-

ings set forth in the record on review, a judgment determining the validity of, and enjoining, setting aside, or suspending, in whole or in part, the order of the agency.

(b) The filing of the petition to review shall not of itself stay or suspend the operation of the order of the agency, but the court of appeals in its discretion may restrain or suspend, in whole or in part, the operation of the order pending the final hearing and determination of the petition. Where the petitioner makes application for an interlocutory injunction suspending or restraining the enforcement, operation, or execution of, or setting aside, in whole or in part, any order reviewable under this Act, at least five days' notice of the hearing thereon shall be given to the agency and to the Attorney General of the United States. In cases where irreparable damage would otherwise ensue to the petitioner, the court of appeals may, on hearing, after not less than five days' notice to the agency and to the Attorney General, order a temporary stay or suspension, in whole or in part, of the operation of the order of the agency for not more than sixty days from the date of such order pending the hearing on the application for such interlocutory injunction, in which case such order of the court of appeals shall contain a specific finding, based on evidence submitted to the court of appeals, and identified by reference thereto, that such irreparable damage would result to petitioner and specifying the nature of such damage. The court of appeals, at the time of hearing the application for an interlocutory injunction, upon a like finding, may continue the temporary stay or

suspension, in whole or in part, until decision on the application.

The hearing upon such an application for an interlocutory injunction shall be given preference and expedited and shall be heard at the earliest practicable date after the expiration of the notice of hearing on the application provided for above.

Upon the final hearing of any proceeding to review any order under this Act, the same requirements as to precedence and expedition shall apply.

SEC. 10. An order granting or denying an interlocutory injunction under section 9 (b) of this Act shall be subject to review by the Supreme Court of the United States upon writ of certiorari as provided in title 28, United States Code, section 1254 (1): *Provided,* That application therefor be duly made within forty-five days after the entry of such order. The final judgment of the court of appeals in a proceeding to review under this Act shall be subject to review by the Supreme Court of the United States upon a writ of certiorari in accordance with the provisions of title 28, United States Code, section 1254 (1): *Provided further,* That application therefor be duly made within ninety days after the entry of such judgment. Either the United States or the agency or an aggrieved party may file such petition for a writ of certiorari. The provisions of title 28, United States Code, section 1254 (3), regarding certification, and of title 28, United States Code, section 2101 (e), regarding stays, shall also apply to proceedings under this Act.

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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 700

JAPAN-ATLANTIC AND GULF FREIGHT CONFERENCE ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, FEDERAL MARITIME BOARD, ISBRANDTSEN COMPANY, INC., AND EZRA TAFT BENSON, SECRETARY OF AGRICULTURE

No. 703

FEDERAL MARITIME BOARD, PETITIONER

v.

UNITED STATES OF AMERICA AND ISBRANDTSEN COMPANY, INC.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 248-260) is reported at 211 F. 2d 51.

JURISDICTION

The judgment of the Court of Appeals (R. 261) was entered on January 21, 1954 (R. 261). The petitions for writs of certiorari were filed on April 20, 1954. The jurisdiction of this Court is invoked under 5 U. S. C., Supp. V, 1040, and 28 U. S. C. 1254(1).

QUESTIONS PRESENTED

In December, 1952, the Japan-Atlantic and Gulf Freight Conference, an association of water carriers, filed a statement with the Federal Maritime Board proposing the introduction of a dual rate system, a system which would require all shippers in the trade involved to employ the Conference lines exclusively on pain of being charged 9.5% higher tariffs if they failed to contract. On January 21, 1953, the Board, without prior hearing and over the timely objections of Isbrandtsen Company, Inc. (a non-Conference line) and the United States, issued an order permitting the employment of the system as of January 23, 1953. The Board reserved for consideration at a future hearing the protests filed by Isbrandtsen and the United States. On petition for review filed by Isbrandtsen, the Court of Appeals set aside the Board's order insofar as it permitted the system to go into operation without the prior approval required by section 15 of the Shipping Act. The court also enjoined the Conference carriers (petitioners in No. 700) from employing the system in the absence of such approval. The following questions are presented:

1. Whether an agreement by a conference of water carriers to adopt a dual rate system is an

agreement within the meaning of section 15 of the Shipping Act, and is accordingly illegal unless and until approved by the Board as consistent with the criteria set forth in that section.

2. If so, whether the Court of Appeals was authorized to grant injunctive relief preventing effectuation of the agreement pending administrative hearing and determination of the objections of the protesting parties.

STATUTE INVOLVED

The Shipping Act, 1916, 39 Stat. 728, as amended, 41 Stat. 996, 46 U.S.C. 801 *et seq.*, provides in part as follows:

> Sec. 14. That no common carrier by water shall, directly or indirectly, in respect to the transportation by water of passengers or property between a port of a State, Territory, District, or possession of the United States and any other such port or a port of a foreign country,—
>
> * * * * *
>
> Third. Retaliate against any shipper by refusing, or threatening to refuse, space accommodations when such are available, or resort to other discriminating or unfair methods, because such shipper has patronized any other carrier or has filed a complaint charging unfair treatment, or for any other reason. [46 U. S. C. 812.]
>
> * * * * *
>
> Sec. 15. That every common carrier by water, or other person subject to this Act, shall file immediately with the [Board] a true copy,

or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this Act, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; alloting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term "agreement" in this section includes understandings, conferences, and other arrangements.

The [Board] may by order disapprove, cancel, or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be in violation of this Act, and shall approve all other agreements, modifications or cancellations.

Agreements existing at the time of the organization of the [Board] shall be lawful until

disapproved by the [Board]. It shall be unlawful to carry out any agreement or any portion thereof disapproved by the [Board].

All agreements, modifications, or cancellations made after the organization of the [Board] shall be lawful only when and as long as approved by the [Board], and before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation.

Every agreement, modification, or cancellation lawful under this section shall be excepted from the provisions of the Act approved July second, eighteen hundred and ninety, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," and amendments and Acts supplementary thereto, and the provisions of sections seventy-three to seventy-seven, both inclusive, of the Act approved August twenty-seventh, eighteen hundred and ninety-four, entitled "An Act to reduce taxation, to provide revenue for the Government, and for other purposes," and amendments and Acts supplementary thereto.

Whoever violates any provision of this section shall be liable to a penalty of $1,000 for each day such violation continues, to be recovered by the United States in a civil action [46 U. S. C. 814].

STATEMENT

Petitioners in No. 700 are a Conference of water carriers and its member steamship lines, all of which are engaged in the transportation of prop-

erty between ports in Japan, Korea, and Okinawa, and ports on the Gulf and Atlantic coasts of the United States (R. 82, 222-3). They operate as a conference under a general agreement approved in 1934, pursuant to section 15 of the Shipping Act (*supra*, pp. 3-5), by the Federal Maritime Board's predecessor.[1] This agreement, which has been amended from time to time, has been continuously approved since that date (R. 222-238).

The basic or organic agreement of the Conference provides in substance that the member lines shall act jointly in establishing rates, and that the rates of each shall be those agreed upon and published in Conference tariffs (R. 223-4). This agreement also declares that "there shall be no undue preference or advantages nor unjust or unreasonable discrimination nor unfair practices against any consignor or consignee by any of the parties hereto" (R. 225, par. 5), and that the "giving or receiving of special rates * * * not offered to all shippers shipping under similar conditions is prohibited" (R. 226, par. 7). The basic agreement makes no reference to the employment of a so-called dual rate or contract/non-contract system.

On December 24, 1952, however, the Conference filed with the Board (petitioner in No. 703) a statement proposing the adoption of a certain contract/non-contract rate system, to become effective

[1] The term "Board" will be used in this brief to refer either to the Federal Maritime Board or to the appropriate predecessor agency.

thirty days thereafter (R. 82-139).[2] "Under the proposed system, shippers who refused to agree in writing to employ Conference lines exclusively would be charged, for the identical transportation and service, tariffs which were nine and one-half per cent higher than those charged shippers who had executed such agreements with Conference lines. And once this exclusive patronage contract

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[2] In implementation of section 15 of the Shipping Act (*supra*, pp. 3-5), the Board has prescribed regulations setting forth the procedure to be followed by conferences proposing to initiate a dual rate system. The Board's General Order 76 (17 Fed. Reg. 10175, November 11, 1952, R. 78-81) provides in pertinent part:

> § 236.3. *Filing for initiation of contract/non-contract rates.* Steamship freight conferences proposing to establish contract/non-contract rates to become effective after the effective date of this Rule shall file with the Federal Maritime Board at least 30 days prior to the initiation of such rates, a statement containing:
>
> (a) The amount of the spread or differential in terms of percentages or dollars and cents;
>
> (b) The effective date;
>
> (c) The reasons for the use of contract/non-contract rates in the particular trade involved, and the basis for the spread or differential between such rates; and
>
> (d) Copies of the form of all contracts pertaining thereto.
>
> * * * * *
>
> § 236.6 *Notice.* All information filed pursuant to this Rule shall be available for inspection by interested parties at the Regulation Office of the Board. A notice of the filing of the statement required under sections 236.2 and 236.3 above will be published in the Federal Register as soon as practicable. Except as may be otherwise provided in cases arising under section 236.4, interested parties shall have twenty (20) days after the date of such publication within which to submit written comments relating to the information filed with the Board pursuant to this Rule. Said comments may include a statement of position with respect to approval, disapproval, or modification, together with a request for hearing, should such hearing be desired.

had been entered into, even a single shipment with any non-Conference carrier would result in the shipper's being required to pay the Conference, as liquidated damages, fifty per cent of the freight charge which the shipper would have paid had such shipment been made in a Conference vessel. If such violations occurred more than once in any year, the shipper's contract with the Conference would be cancelled and he would not be permitted to enter into a new agreement until the liquidated damages had been paid in full" (R. 250-1).

Within the time prescribed by Board regulations (see General Order 76, § 236.6, note 2, *supra*), the United States and Isbrandtsen (the only non-Conference line in the trade involved) filed protests with the Board, urging that the proposal was unreasonable, retaliatory, unjustly discriminatory and illegal under the Shipping Act, and should be disapproved, and requesting that its effective date be suspended pending the conduct of a full hearing (R. 140-180, 215-216).

On January 21, 1953, the Board, without having conducted a hearing, entered the order under review. This order finds (R. 221) that it does not appear "that the differential between said contract/non-contract rates is arbitrary, unreasonable, or unjustly discriminatory, nor that the initiation of the proposed contract/non-contract rate system will be unjustly discriminatory or unfair or detrimental to the commerce of the United States, or will be in violation of the Shipping Act, 1916, as amended, or will cause irreparable damages to

Isbrandtsen Co., Inc." The order concludes by denying the protestants' request for suspension of the effective date of the proposal and by ordering a hearing on the issues raised by the protests at a time and place to be fixed in the future.

Isbrandtsen thereupon instituted its review proceedings, naming the United States and the Board as respondents.[3] On March 23, 1953, the Court of Appeals issued an injunction *pendente lite,* finding, *inter alia,* that "the institution of the proposed exclusive patronage dual rate system would greatly injure [Isbrandtsen's] business as an independent carrier and would, through loss of patronage, subject [Isbrandtsen] to the grave jeopardy of elimination from the trade" (R. 241-2). The Conference and the Board applied for writ of certiorari, urging that the Court of Appeals was without jurisdiction to enjoin the Board's action. This Court denied the writ, 345 U. S. 975.

On January 21, 1954, the Court of Appeals issued its opinion on the merits (R. 248), holding (1) that the Conference agreement to adopt the dual rate system was clearly an agreement (or a modification of an agreement) required to be submitted to the Board under section 15 of the Shipping Act; (2) that, under that section, such agreements are illegal unless and until approved by the Board; (3) that the Board's action permitting the system to take effect in advance of hearing and determina-

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[3] The Conference and its members intervened in support of the Board's order (R. 72), and the Secretary of Agriculture intervened in support of Isbrandtsen (R. 247).

tion under section 15 was unauthorized; and (4) that such action by the Board was immediately reviewable because it was determinative of important rights and because the institution of the system threatened Isbrandtsen with "real, immediate and incalculable harm." The court's judgment (R. 261-2) restrains effectuation of the Conference proposal pending a Board determination of its legality in conformity with section 15 of the Shipping Act.[4]

ARGUMENT

1. The case of *Isbrandtsen Co.* v. *United States*, 81 F. Supp. 544 (S. D. N. Y.), appeal dismissed *sub nom. A/S J. Ludwig Mowinckels Rederi* v. *Isbrandtsen Co.*, 336 U. S. 941, appears decisive on the proposition that a dual rate proposal must be specifically and independently considered, in accordance with proper administrative procedures, before it can have any claim to legality. In that case, the Board had given its summary approval to basic Conference agreements, filed by two North Atlantic conferences, which *in terms* provided that the conferences might employ the dual rate device. Isbrandtsen, which had not protested to the Board, sought an injunction from a three-judge district court[5] to restrain the conferences involved from effectuating their announced intention to put an

[4] Evidentiary hearings before the Board's examiner were completed, some months ago. There has been no decision by the agency.

[5] Prior to the Act of December 29, 1950, 5 U.S.C., Supp. V, 1031, *et seq.*, suits to set aside Board orders were brought before three-judge district courts, rather than before courts of appeals. Shipping Act, § 31, 46 U.S.C. 830.

exclusive patronage system into immediate operation. It also asked the court to restrain so much of the Board's order as authorized use of such system. The court issued an injunction so that Isbandtsen might go back to the Board and obtain a full evidentiary hearing on the propriety of the particular dual rate proposals in question.

The conferences appealed to this Court, urging that the lower court was without jurisdiction to grant injunctive relief, and that Isbrandtsen's only remedy was to complain to the Board and to await final administrative disposition of its complaint. Isbrandtsen, for its part, contended that the lower court clearly had the power to prevent unauthorized institution of a dual rate system in advance of a full determination of its legality, and that the appeal presented no substantial question warranting full argument. See No. 622, Oct. Term, 1948, statement as to jurisdiction, motion to affirm, and reply thereto. This Court dismissed the appeal *per curiam*.[6]

If, as clearly held by the above decision, Board approval of an agreement providing, generally,

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[6] The Board subsequently held an adversary proceeding and approved the proposals. When the case went back to the district court, the court held that the differentials between the contract and non-contract rates were not justified by the Board's findings and were arbitrary, unreasonable, and unjustly discriminatory. The court found it unnecessary to reach the question whether a dual rate system is *per se* illegal under the Shipping Act. The judgment of the district court was affirmed on appeal by an equally divided court. *Isbrandtsen* v. *United States*, 96 F. Supp. 883 (S.D. N.Y.), affirmed *sub nom. A/S J. Ludwig Mowinckels Rederi* v. *Isbrandtsen Co.*, and *Federal Maritime Board* v. *United States*, 342 U.S. 950.

for use of the dual rate system is ineffective in the absence of full and explicit consideration of the dual rate provision of the particular contract, it needs no argument that the Board's approval, in the instant case, of a basic Conference agreement which made no mention of dual rates was ineffective, standing alone, to authorize the employment of a dual rate system.[7]

The claim made by petitioners in No. 700 (Pet., p. 14 et seq.) that the decision below conflicts with *U. S. Navigation Co.* v. *Cunard S. S. Co.*, 284 U. S. 474, and *Far East Conference* v. *United States*, 342 U. S. 570, is without foundation. Those cases held that the legality of a dual rate system might not be challenged initially by a suit filed under the antitrust laws, but should be determined in the first instance by the Board pursuant to the procedures provided in the Shipping Act. The decision below held simply that the Board has failed to follow the procedures required by the Shipping Act, a conclusion which is actually supported by the *Cunard* and the *Far East* cases.

Thus, when *Cunard* was before the Court of Appeals for the Second Circuit, that court observed (50 F. 2d 83, 89) that "the failure to secure the approval of [a dual rate] agreement [is] forbidden by the Shipping Act * * *." This Court, in affirming, declared that the courts should not take jurisdiction under the antitrust laws "in advance of

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[7] On its face, the language of the basic agreement of the Japan-Atlantic Conference appears inconsistent with the employment of any dual rate system. See p. 6, *supra*.

* * * hearing and determination" by the Board under the Shipping Act (284 U.S. at 487). The *Far East* case held that the same principles apply when the antitrust suit is one instituted by the Government. The decision of the Court of Appeals in the instant case holds, quite consistently, that action by carriers which is illegal in the absence of Board approval shall not be permitted to take effect before the Board has fully performed the statutory duty within its primary jurisdiction—"advance * * * hearing and determination."[8]

2. Examination of the Shipping Act compels the conclusion that the Board's action permitting the initiation of the dual rate system was unauthorized. Under section 15, water carriers subject to the Act are required to file with the Board a true copy (or, if oral, a true and complete memorandum) of *every* inter-carrier agreement (or modification or cancellation thereof) to which they are party, if such agreement relates, *inter alia,* to any of the following matters:

(1) "fixing or regulating transportation rates or fares";

(2) "giving or receiving special rates * * *";

[8] Contrary to the Conference's suggestion (Pet. in No. 700, p. 15), there is no "anomaly." This Court has held that antitrust proceedings against conferences for allegedly unauthorized activities shall not be entertained until the Board, the expert body charged with the regulation of conference activities, has spoken. But this cannot immunize agency action, if found to be unauthorized under the Shipping Act and to threaten irreparable injury, from the supervision of the reviewing court. That was the basis for the injunction in the first *Isbrandtsen* case, as well as in the instant case.

(3) "controlling, regulating, preventing, or destroying competition."

The section further states that the term " 'agreement' * * * includes understandings, conferences, and other arrangements."

All agreements made subsequent to the organization of the Board are explicitly declared unlawful "before approval or after disapproval" by the Board (*ibid.*). They shall be lawful, the Act states, "only when and as long as approved * * *" (*ibid.*).

The Act also defines with particularity the criteria that are to be satisfied before an agreement filed with the Board may be lawfully approved and granted the special immunity from the antitrust laws which such approval carries with it. Section 15 provides in substance that the Board shall approve an agreement if it "finds" (1) that it is not "unjustly discriminatory or unfair as between carriers, shippers, etc."; (2) that it will not "operate to the detriment of the commerce of the United States"; and (3) that it is not in violation of provisions of the Shipping Act.

The Statement which the Conference filed with the Board in December 1952 was a memorandum of an agreement reached by the members of the Conference to adopt, on a certain date, a certain practice, namely, the practice of charging shippers undertaking to sign exclusive patronage contracts 9.5% less than the published rates available to shippers at large. As such, it is an agreement re-

lating to the regulation of transportation rates. Moreover, the proposed system involves the giving of special rates to a particular group of shippers —those agreeing to sign exclusive patronage contracts. Finally, it is a system which has as its clear purpose the destruction of such competition as is currently being provided by Isbrandtsen, the lone non-Conference member in the trade.[9] On three distinct counts, therefore, we believe it plain that the agreement is of a kind required to be filed under section 15.[10]

Since agreements required to be submitted to the Board under section 15 are explicitly declared unlawful "before approval," it follows that the Board was without power to sanction the initiation of the Conference's dual rate proposal in advance of hearing and determination of the legal and factual issues raised by the United States and Isbrandtsen.

3. Petitioners, seeking to avoid the impact of section 15, emphasize the fact that the organic agreement pursuant to which the Conference oper-

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[9] Obviously, that is the sole reason for the adoption of the agreement. Since the only shippers upon whom this dual rate system would have impact are shippers interested in doing business with Isbrandtsen, it necessarily follows that, to the extent shippers are influenced by the rate differentials, to such extent they will be coerced into withdrawing business from Isbrandtsen. And since, in the nature of things, most shippers are dependent upon the availability of service from various lines, the effectiveness of a dual rate system as an economic weapon is scarcely to be doubted. See *infra*, pp. 18-19.

[10] This, of course, is not to say that the agreement is one which may be approved. The reporting or filing requirements of section 15 are comprehensive. But the Board is only empowered to approve those filed agreements found to meet the criteria specified in the Act.

ates has been explicitly approved by the Board. To this the short answer is that the basic Conference agreement neither mentions nor foreshadows the employment of any dual rate system, no less the adoption of the particular agreement involved in this case.

The requirement of advance consideration of "every agreement * * * or modification or cancellation thereof" was deliberately imposed by Congress. While the draftsmen of the Shipping Act stated that they were prepared to admit that there might be advantages in steamship agreements and conferences, they added that they were "not disposed to recognize [them] unless the same [were] brought under some form of *effective government supervision.* To permit such agreements without government supervision would mean giving the parties thereto unrestricted right of action. Abuses exist, and the numerous complaints received by the committee show that they must be recognized. In nearly all the trade routes to and from the United States the conference lines have virtually a monopoly of the line service" (Alexander Report, H. Doc. 805, 63rd Cong., 2nd Sess., pp. 417-8; italics added).

4. Petitioners also argue that, as a matter of administrative practice, the Board has long permitted conferences to effect routine rate changes without prior specific approval. They suggest further that the adoption of a dual rate system should be treated like ordinary rate-making. And they contend finally that the decision below "is pregnant with

fundamental revisions in an administrative pattern conformed by long practice to the needs of ocean shipping" (Pet. in No. 703, p. 28).

In *Ex Parte 4, Section 15 Inquiry,* 1 U.S.S.B. 121, the Board conducted an inquiry for the express purpose of determining the meaning of the word "every" as used in the clause of section 15 requiring "every agreement * * * or modification thereof" to be filed. It concluded (p. 125) that it would be "too literal [an] interpretation of the word 'every' to include routine operations relating to current rate changes *and other day-to-day transactions*" (italics added). But the Board made clear that the exception from the statute which it was proposing to create was a very narrow one and that it would not apply, *inter alia,* to agreements "giving or receiving special rates * * * or destroying competition * * * or in any manner providing for an exclusive * * * working arrangement" (p. 125, note).

The Court of Appeals neither stated nor implied that the Board was required to give specific advance consideration to routine day-to-day rate adjustments and like transactions. It declared only that the adoption of the proposed exclusive patronage system "can hardly be classified as an interstitial sort of adjustment since it introduces an entirely new scheme of rate combination and discrimination not embodied in the basic agreement" (R. 257).

This declaration is palpably correct. No analogy can be drawn between routine day-to-day rate adjustments and the institution of a dual rate system.

The latter does not involve rate-making at all, but rather the adoption of a drastic technique of economic warfare whose open, if not avowed, purpose is to drive out the independent carrier. In a brief filed in the earlier *Isbrandtsen* case, the Board stated:

> The contract system should be frankly recognized as a device tending towards the monopolization of ocean commerce in particular trades by the members, collectively, of conferences which serve those trades. We use the word "monopolization" with no ideological overtones, but merely in its dictionary sense, which is the obtaining or assumption of "exclusive possession or control." Whether the contract system in a particular case actually has the effect of producing a complete monopoly (i.e., control of a trade) depends upon how well it works; admittedly, it is monopolistic in purpose. The extent to which it is monopolistic in effect depends upon how successfully that purpose is achieved * * *. The record warrants the conclusion that if a contract system is wholly effective, it will result in a complete monopoly in the sense that all cargo moving in a trade where the system is used, will move in ships of conference carriers. Necessarily, in these circumstances, there would be no service by independent operators * * *. In considering the system itself (precedent to examination of specific contract provisions), we feel that this court should assume that the conference contracts are in fact effective; that shippers sign them in substantial numbers, voluntarily or as a choice of evils; that they

> exclude Isbrandtsen from carrying the freight of all shippers who sign; and that the contracts seriously restrict Isbrandtsen's access to cargoes for its ships, and will continue to do so if, and as long as, the conferences employ the contract system and Isbrandtsen remains a non-member.[11]

A system which frankly aims at nothing less than "producing a complete monopoly" is not, by any standard, routine rate-making or an ordinary day-to-day transaction. In the light of the provisions of section 14 Third of the Shipping Act (*supra*, p. 3), there are grave doubts whether such a system is susceptible of Board approval. The Board itself, on a number of past occasions, has condemned the dual rate device.[12] It seems plain, at the least, that an agreement to adopt the system

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[11] The quoted passage is set forth in the margin of the opinion of the three-judge district court. See *Isbrandtsen* v. *United States*, 96 F. Supp. at 888.

[12] In *Eden Mining Co.* v. *Bluefields Fruit & S.S. Co.*, 1 U.S.S.B. 41, 45-6, the Board, referring to the dual rate system, stated:

> Under the statute, the complainants, as members of the shipping public, were entitled to have their shipments carried at the same rates as other patrons who received identical service. This right attached to each individual transportation transaction as such, and was not to be predicated upon any condition imposed by the respondent restricting the complainants' freedom of choice as to what carrier or carriers they should elect to patronize in connection with subsequent shipments.

And in *Contract Routing Restrictions*, 2 U.S.M.C. 220, 226, the Board declared that "[e]quality of treatment is not accorded the shipper merely by giving him the opportunity to enter into discriminatory contracts in the same manner as offered to all shippers."

The course of Board decision on dual rate proposals, which has been a vacillating one, is summarized in the brief in opposition filed by respondent Isbrandtsen at pp. 16-17.

may not be permitted to take effect, over the objections of interested parties, without a hearing. As stated above, section 15 was drawn inclusively so that immunity from the antitrust laws would be accorded only in cases where there was a specific showing meeting the statutory requirements and standards. Unless the language relating to "every agreement" is to be drained of all meaning, it must be held to control this case.

The very procedure required by the Court of Appeals' decision was adopted by the Board in September 1952 (only three months before the Board's order in the present case) in dealing with a dual rate proposal filed by the North Atlantic Continental Freight Conference. The Board stated in that case (*Contract Rates—North Atlantic Continental Freight Conference,* Docket No. 724, slip opinion, p. 10):

> The decision in *Isbrandtsen* v. *United States,* 96 F. Supp. 883, as affirmed by the Supreme Court, necessarily has had its impact on the practices of the Board. Unless the Board is fully advised in respect to the spread between dual rates, it cannot be sure that the spread is not arbitrary and the system free of discrimination. * * *
>
> * * * * *
>
> For the carriers to put the dual rate system into effect prior to the completion of our inquiry would, in our judgment, operate to the detriment of the commerce of the United States.

The Board's General Order 76 (R. 78-81) plainly contemplates the scrutiny of all dual rate proposals. To give them full consideration in advance of their taking effect will work no undue burden on the Board. The statute requires no less.

5. It follows, we believe, from what has been stated above that the Court of Appeals was not powerless to grant injunctive relief. As Judge Bazelon stated, the order permitting the institution of the system "virtually removed Isbrandtsen from the shipping market involved" (R. 256). This "action was just as determinative of Isbrandtsen's rights as it would have been had the Board specifically and affirmatively approved the dual rate system agreement in accordance with the statutory requirements * * *" (*ibid.*). The jurisdiction of the lower court is fully sustained by this Court's dismissal of the appeal from the injunction issued in the prior *Isbrandtsen* litigation discussed *supra*, pp. 10-12.[13] And see, also, *Columbia Broadcasting System* v. *United States*, 316 U. S. 407, 416; *Stack* v. *Boyle*, 342 U. S. 1, 6; *Algonquin Gas Transmission Co.* v. *Federal Power Commission*, 201 F. 2d 334, 338 (C. A. 1).

Petitioners seek comfort from cases like *Carlsen* v. *United States*, 107 F. Supp. 398 (S. D. N. Y.),

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[13] Judge Fahy's dissent (R. 260) takes the view that Isbrandtsen should have sought equitable relief in a district court. This position appears irreconcilable with this Court's holding in the prior *Isbrandtsen* litigation, since the injunction there was issued by a three-judge, not by a single-judge, district court. As pointed out *supra*, note 5, the Act of December 29, 1950, transferred review of Federal Maritime Board orders from three-judge district courts to courts of appeals.

which held that a refusal by the Interstate Commerce Commission to suspend tariffs filed by certain interstate bus carriers was not reviewable. The difference between that situation and the instant one goes to the roots. Tariffs filed by a carrier with the Interstate Commerce Commission have an effect equivalent to law *until declared unlawful* by the Commission (*Western Union* v. *Esteve Bros.*, 256 U. S. 566; *Boston & Maine Railroad* v. *Hooker*, 233 U. S. 97); agreements between water carriers providing for joint action (and, similarly, agreements between rail carriers to act in concert, see Interstate Commerce Act, section 5a, 49 U. S. C. (Supp. V) 5b) are explicitly declared by statue to be *unlawful until approved.* It was the imminent effectuation of an *unlawful agreement*—one which threatened to create a monopoly in the trade—which the Court of Appeals enjoined in this case. This was done, as in the earlier *Isbrandtsen* litigation, not by way of interference with the primary jurisdiction of the Board, but to preserve the *status quo* pending the exercise of primary jurisdiction in the manner required by statute.

CONCLUSION

The decision below conforms fully to decisions of this Court and is plainly correct. There is no conflict in the circuits. The petitions should be denied.

Respectfully submitted,

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MAY, 1954.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1954 299894 1300